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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-911

JOSEPH M. DRISCOLL,

Petitioner,

—v.—

INTERNATIONAL UNION OF OPERATING ENGINEERS,

Respondent,

LOCAL 139,

—and—

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. .....

JOSEPH M. DRISCOLL,

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139,

Respondent,

—and—

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Joseph M. Driscoll, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on September 11, 1973.

Opinions Below

The opinion of the United States Court of Appeals is not yet reported. It is set forth in the Appendix, *infra,* pp. 1a-14a. The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 339 F.

Supp. 757 (1972) and is set forth in the Appendix, *infra*, pp. 15a-25a.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 11, 1973. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether §102 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §412, confers jurisdiction upon a federal district court over an action alleging that the imposition of a non-Communist affidavit requirement as a condition for inclusion on the ballot in local union elections violates a candidate's right to free speech protected by §101(a)(2) of the LMRDA, 29 U.S.C. §411(a)(2)?

2. Whether the imposition of a non-Communist affidavit requirement as a condition for inclusion on the ballot in local union elections, sanctioned by §§401(e) and 504 of the LMRDA, 29 U.S.C. §§481(e), 504, constitutes such "governmental action" as lodges a federal district court with jurisdiction under 28 U.S.C. §1331 over an action alleging that the affidavit requirement abridges rights protected by the First and Fifth Amendments to the United States Constitution?

3. Whether the imposition of a non-Communist affidavit requirement as a condition for inclusion on the ballot in

local union elections violates a candidate's rights to freedom of speech and assembly protected by §101(a)(2) of the LMRDA, 29 U.S.C. §411(a)(2)?

4. Whether the imposition of a non-Communist affidavit requirement as a condition for inclusion on the ballot in local union elections violates a candidate's right to free speech and association, and due process of law, protected by the First and Fifth Amendments to the United States Constitution?

Constitutional and Statutory Provisions Involved

This case involves the First and Fifth Amendments to the United States Constitution and various provisions of the Labor-Management Reporting and Disclosure Act of 1959, which are included in the Appendix, *infra*, pp. 26a-30a.

Statement of the Case

On June 12, 1968, Plaintiff-Petitioner Driscoll, a member in good standing of Local 139 of the International Union of Operating Engineers, was nominated for the office of treasurer of the Local (Stip. ¶3).[1] Upon nomination, the union sent him two documents for his signature, an acceptance of nomination and a non-Communist affidavit, both of which were required by the International Union of Operating Engineers Constitution (Stip. ¶4, Exhib. "C").

The Constitution of the International Union, Art. XXIII, subdiv. 1 §(b) (1968 Amendment), prescribes certain terms

[1] The stipulation of facts was agreed upon by the respective parties and approved by the District Court on October 19, 1970. A copy of the stipulation appears in the Original Record as Item No. 7.

that govern eligibility for candidacy for office in affiliated local unions such as Local 139 (Stip. ¶2, Exhib. "B").

> No member shall be eligible for election, be elected nor hold office . . . unless he shall have filed with the Recording-Corresponding Secretary of the Local Union within ten days after having been notified in writing by the Recording-Corresponding Secretary of his nomination to Local Union office, *a non-Communist affidavit* and a written acceptance of his nomination to office . . . . (Emphasis added.)

The International's constitution does not prescribe the language to be used in the non-Communist affidavit, leaving this to the discretion of the Executive Board of the Local Union. Article XXIII, Subdiv. 1 §(d) (Stip. ¶2, Exh. "B"). Accordingly, Local 139 tendered the following affidavit to petitioner:

> I swear that I am not at the present time or have ever been a member of the Communist Party or any other subversive organization dedicated to or advocating the overthrow of the Government of the United States (Stip. ¶4, Exh. "D").

Recognizing the constitutional infirmities of this affidavit, respondents revised it in April 1971 for the 1971 election to read as follows:

> I swear that I am not a member of the Communist Party or other organization that advocates the overthrow of the United States Government by force or violence, knowing of and sharing in such advocacy and acting pursuant to the teaching that the United States

Government should be overthrown by such means. (Supplemental Affidavit of Joseph J. Goetz, Jr., dated April 3, 1971. Item No. 12, Record.)

Petitioner signed the acceptance of nomination but mailed back the non-Communist affidavit without a signature (Stip. ¶4, Exh. "D"). In a letter dated July 3, 1968, the business manager of Local No. 139 called to Driscoll's attention the fact that he would not be eligible to run for office unless he executed the affidavit by July 8, 1968 (Stip. ¶5, Exh. "E"). On July 5, Driscoll responded that he had not executed the non-Communist affidavit because "the United States Supreme Court ruled that section of the labor law unconstitutional" (Stip. ¶5, Exh. "F"). On July 8, Local No. 139's election committee ruled that Driscoll was ineligible to run for office because of his failure to execute a non-Communist affidavit as required by the International's Constitution (Stip. ¶6, Exh. "G").

On July 10, petitioner was informed of his ineligibility (Stip. ¶7). He then wrote to the General President of the International Union restating his conviction that execution of the non-Communist affidavit was unconstitutional and requesting that the election committee be instructed to place his name on the ballot (Stip. ¶7, Exh. "H"). By letter dated July 28, 1968 the General President responded that he could not comply with Driscoll's request (Stip. ¶8, Exh. "I"). The decision was promptly appealed to the General Executive Board of the International Union (Stip. ¶9, Exh. "J," "K"). On January 15, 1969, petitioner was informed by letter from the General Secretary of the International Union that the appeal had been denied (Stip. ¶16, Exh. "S").

On March 11, 1969, Driscoll filed a complaint with the United States Department of Labor pursuant to Title IV of the LMRDA, 29 U.S.C. §§481-483 (Stip. ¶17, Exh. "T"). The Labor Department processed the complaint and, on May 1, 1969, Driscoll was informed that his "complaint to the Secretary of Labor alleging violations of §401 of the . . . [LMRDA, 29 U.S.C. §481] . . ." had been investigated, and that it had "been determined that this case is not suitable for litigation under §402 of the Act [29 U.S.C. §482]" (Stip. ¶17, Exh. "U").

On January 29, 1970, petitioner commenced this action in the United States District Court for the Eastern District of Wisconsin challenging the constitutionality of this requirement. His complaint asked that the requirement for elective office in the Local Union, namely that a candidate sign a non-Communist affidavit before his name can be placed on the ballot, be declared void and unconstitutional. The Complaint also asked that the respondents be enjoined from excluding qualified candidates from office under the guise of the affidavit requirement, and that the respondents be directed to accept qualified candidates without regard to whether they have signed a non-Communist affidavit.

The Complaint alleged that respondents' refusal to place petitioner's name on the ballot because of his refusal to comply with the affidavit requirement violated his rights under the First and Fifth Amendments to the United States Constitution and his rights under the Labor Management Reporting and Disclosure Act, Title 29 U.S.C. §411. The Complaint further alleged that the district court had jurisdiction to entertain petitioner's claims under 29 U.S.C. §412. In addition, petitioner's amended complaint alleged that the action arose under the Constitution of the United

States, and that the matter in controversy exceeds the amount of ten thousand dollars exclusive of interest and costs. Jurisdiction was also claimed by virtue of Title 28 U.S.C. §§1331 and 1337.

On March 4, 1971, respondents filed a motion to dismiss for lack of jurisdiction or, alternatively, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On March 23, 1972, the district court issued its order and opinion dismissing the complaint for want of jurisdiction over the subject matter, and deciding each of the jurisdictional issues against Driscoll. In doing so, the court concluded that the International Union's action did not involve sufficient governmental activity to invoke the proscriptions of the First and Fifth Amendments to the United States Constitution. Thus, jurisdiction could not be claimed under 28 U.S.C. §1331. The court also found that there was no basis for jurisdiction under the LMRDA on the grounds that the rights asserted by petitioner were not related to the Bill of Rights guarantees of that Act, 29 U.S.C. §411. Consequently, jurisdiction could not be claimed under 29 U.S.C. §412 which provides for judicial review of claims arising under 29 U.S.C. §411. Nor could jurisdiction be claimed under 28 U.S.C. §§1331 and 1337. On September 11, 1973, the Court of Appeals affirmed in all respects.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to clarify the scope of this Court's decision in *Calhoun* v. *Harvey*.

The first question presented in this petition is important because clarification is needed of the scope of *Calhoun* v. *Harvey*, 379 U.S. 134 (1964), and because the issues and conflicts which this Court sought to resolve by its decision in *Calhoun* remain extant.

Those issues concern the interplay between Title I and Title IV of the LMRDA. Although the rights protected by Title I and Title IV overlap to some extent, the remedies available under each Title differ markedly. Title I authorizes a private action to redress infringement of the rights it secures. By contrast, Title IV does not permit private actions. Instead, it sets up a procedure for filing a complaint with the Secretary of Labor who may in turn bring an action in federal court to contest the validity of an election. This Title IV remedy is declared to be the exclusive manner of challenging an election already conducted.

Calhoun, the only case in which this Court considered the relationship between Title I and Title IV, was an action by several union members against the union and two of its officers. The complaint alleged that certain provisions of the bylaws and the union constitution denied rights protected by §101(a)(1), 29 U.S.C. §411(a)(1), the "equal rights" provision. Jurisdiction was alleged under §102, 29 U.S.C. §412.

The union bylaws complained of provided that a member could only nominate himself. The national constitution provided that, to be eligible, a candidate must have been a member of the national union for five years, and have served 180 or more days of sea time in each of two of the preceding three years on vessels covered by collective bargaining agreements with the union. The plaintiffs sought an injunction against future union elections until reasonable eligibility requirements were established.

This Court held that the district court was correct in dismissing the complaint. "Jurisdiction of the District Court under §102 of Title I depends entirely upon whether this complaint showed a violation of rights guaranteed by §101 (a)(1) . . . . " 379 U.S. at 138.

In applying this principle to the case before it, this Court properly looked behind the complaint's conclusory allegation of a denial of "equal rights," to determine whether the facts alleged could fairly be read as manifesting such a denial. After examining the complaint, the Court concluded, "The complaining union members here have not been discriminated against in any way and have been denied no privilege or right to vote or nominate which the union has granted to others . . . . Whether the eligibility requirements set by the union's constitution and bylaws were reasonable and valid is a question separate and distinct from whether the right to nominate on an equal basis given by §101(a)(1) was violated." 379 U.S. at 139.

The eligibility requirements at issue in *Calhoun* were not relevant in assessing whether a claim under Title I was alleged, because those requirements did not themselves deny Title I rights; the only objection to them was that they

were "unreasonable" and hence denied Title IV rights. As the Court ruled, " . . . possible violations of Title IV of the Act regarding eligibility are not relevant in determining whether or not a district court has jurisdiction under §102 of Title I of the Act." 379 U.S. at 139-140.

The Court's process of decision was no different from the process it employs in determining whether, in a complaint alleging general federal question jurisdiction under 28 U.S.C. §1331, the proffered federal claim is "frivolous or a mere matter of form." C. Wright, *Law of Federal Courts* 62 (2d ed. 1970). See *Bell* v. *Hood,* 327 U.S. 678, 682-83 (1946), cited in *Calhoun,* 379 U.S. at 137 n. 9.

Mr. Justice Stewart, joined by Mr. Justice Harlan, concurred in the *Calhoun* decision. They agreed with the majority that the pleadings were inadequate, and certainly that there was no showing of a denial of the equal right to nominate. They were concerned, however, that the Court's broad language might in a later case unduly restrict the availability of private remedies for violations of Title I rights. Mr. Justice Douglas dissented.

A. *The Decision of the Court Below Brings Into Question This Court's Decision in* Calhoun v. Harvey.

The court below incorrectly applied *Calhoun* to the undisputed facts in this case. The court below appears to have read *Calhoun* as holding that, in any case where there is arguably an overlap between Title IV and Title I, there is never jurisdiction under §102, even if a non-frivolous Title I claim is alleged.[2] That result is not compelled by the

[2] The only exception the court below was willing to entertain would be a case challenging a " . . . candidacy requirement that is part of a purposeful program of suppressing any expression of

Calhoun holding, nor is it supported by the policies behind Title IV.

The essential distinction between *Calhoun* and this case is that the complaint filed in this case plainly stated a claim under §101(a)(2), the "free speech" provision, without regard to the "reasonableness" under Title IV (specifically, §401(e), 29 U.S.C. §481(e)), of the non-Communist affidavit requirement. Thus, this case is quite different from *Calhoun* because it squarely presents the question whether a well pled complaint alleging a violation of Title I of the LMRDA, that does not depend on possible Title IV violations, states a private cause of action over which federal district court jurisdiction lies pursuant to §102 of the LMRDA, despite the fact that the union practice challenged involves the election process.

Another striking difference exists between this case and *Calhoun*. None of the purposes Congress sought to achieve in Title IV's exclusive enforcement machinery support the result reached below. These purposes were identified in *Calhoun*, as follows. First, Congress believed it was not desirable to allow "individuals to block or delay union elections by filing federal-court suits for violation of Title IV." 379 U.S. at 140. Second, "Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies . . . ." 379 U.S. at 140.

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dissent by plaintiff. . . ." or an eligibility requirement that ". . . that is a discriminatory, *ad hoc* device calculated to perpetuating certain individuals in office." App., *infra*, p. 7a. No analysis is provided to justify making only this one extraordinary exception to the otherwise preclusive force of Title IV. The court below was merely attempting to rationalize its decision with the conflicting one of the Second Circuit in *Shonfeld* v. *Penza*, 477 F.2d 899 (2d Cir. 1973).

Third, when a union fails to remedy election difficulties internally, Congress chose "to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." 379 U.S. at 140.

In *Calhoun*, where the complaint was addressed to the reasonableness of the eligibility requirement, these goals were furthered by limiting the remedy to that provided by Title IV. These policies do not, however, support the result reached below.

First, the relief prayed for in the complaint did not seek to "block or delay" any election. Petitioner alleged his continuing desire to be a candidate. He will be satisfied if the relief sought is implemented at the first regularly scheduled election after the successful termination of the litigation. He does not seek to upset the result of any prior election. Moreover, in a case like the instant one, which does not require a trial to find facts, the legal issue of the validity of the oath requirement can be resolved expeditiously.

Second, free speech issues such as these do not lend themselves to internal resolution by a union. Indeed, resort to a private action under §101(a)(2) has often been necessary to redress union action infringing upon free speech rights. See, e.g., *International Brotherhood of Boilermakers* v. *Rafferty*, 348 F.2d 307 (9th Cir. 1965); *Salzhandler* v. *Caputo*, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963); *Retail Clerks, Local 648* v. *Retail Clerks International Ass'n*, 299 F. Supp. 1012 (D.D.C. 1969).

Third, the free speech issues presented here are not within the special competence of the Secretary of Labor. Furthermore, First Amendment rights are too precious to

be left to government administrators for their enforcement. Experience has taught that such officials are not vigilant in protecting these rights. Cf., e.g., *Stewart* v. *Washington*, 301 F. Supp. 610 (D.D.C. 1969) (3-judge court) (loyalty oath for federal employees invalidated).

An additional ground relied on by the court below was that, in its view, *Calhoun* precludes the availability of any pre-election relief. This Court has not read *Calhoun* so broadly. Thus, in *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 531 (1972), *Calhoun* was cited for the following proposition: "This Court has held that §403 prohibits union members from initiating a private suit to set aside an election."

Moreover, since post-election relief is clearly precluded by Title IV, a preclusion of all pre-election relief as well would eliminate private federal remedies over any claim which even indirectly pertains to election matters. Such a result would surely satisfy the fears expressed by Justices Stewart and Harlan in their concurring opinion in *Calhoun*. 379 U.S. at 141-47. Such a result is not justified by the language of Title IV. Section 403 of that Title, 29 U.S.C. §483, specifically provides that existing pre-election rights shall not be affected by this "subchapter," and that the "subchapter" provides the sole remedy for challenging an election already conducted. The "subchapter" consists only of Title IV.

B. *There Is a Conflict Between the Court Below and Other Circuits Over the Meaning of* Calhoun v. Harvey.

An additional reason for granting certiorari on the first question presented is that the decision below conflicts with the decisions of other federal courts.

The sharpest conflict exists with the Second Circuit's holding in *Schonfeld* v. *Penza*, 477 F.2d 899 (2d Cir. 1973), which involved a free speech claim which could also have been made under Title IV. A union official was removed from office and declared ineligible for office for five years. Plaintiffs sought injunctive relief against the removal and against an interim election to replace the ousted official. The court of appeals recognized that a violation of rights protected by Title IV (specifically, §401(e), 29 U.S.C. §481 (e)) was alleged, since plaintiffs complained of a removal from office and declaration of ineligibility to run for office. 477 F.2d at 902. The plaintiffs further alleged, however, that these actions infringed upon free speech rights protected by §101(a)(2), 29 U.S.C. §411(a)(2), because they had the effect of suppressing dissent within the union. 477 F.2d at 903. The Court, acting with restraint and deciding no more than necessary to find jurisdiction, held,

> The competing values between Title I rights and Title IV procedural requirements are best reconciled, in our opinion, by limiting initial federal court intervention to cases where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union. 477 F.2d at 904.

The Seventh Circuit, below, found *Schonfeld* v. *Penza* to be factually distinguishable. This is too facile. Freedom of speech is important, and not only in the context of a "history of union fractionalism." 447 F.2d at 903. To so limit intra-union free speech is to engraft a grandfather clause on Title I by saying that only dissenters of long

standing have free speech rights enforceable in a private action. Even assuming arguendo that there was not a long history of attempts to exclude "Communists" from the IUOE,[3] the newness of the speech or its suppression is not a rational basis for treating it differently from other dissent.

Other cases within the Second Circuit, analogous to *Schonfeld* v. *Penza* insofar as jurisdiction under Title I was upheld even though the plaintiff's claim arguably fell within Title IV as well, are *Navarro* v. *Gannon,* 385 F.2d 512, 520 (2d Cir. 1967), *cert. denied,* 390 U.S. 989 (1968) (international union's supervision of local's meetings, although arguably an infringement of the right to vote protected by §401(e), 29 U.S.C. §481(e), held to violate §§101 (a)(1) and (2), 29 U.S.C. §§411(a)(1), (2), and thus the district court had jurisdiction under §102, 29 U.S.C. §412); *Schonfeld* v. *Raftery,* 335 F. Supp. 846 (S.D.N.Y. 1971) (Lasker, J.) (jurisdiction upheld in action alleging that voting scheme prescribed by by-laws and constitution violates Title I rights; *Calhoun* distinguished on ground that no relief sought with respect to conduct of any particular election); *O'Brien* v. *Paddock,* 246 F. Supp. 809 (S.D.N.Y.

[3] Communists, in fact, have long been unwelcome in the IUOE. The 1968 version of the constitution provides, as it has for some time, that any member "guilty" of belonging to the Communist Party "shall forthwith be expelled from membership or otherwise disciplined . . . ." Art. XVI, section 4. See also Art. I, section 2. See G. Mangum, *The Operating Engineers* 235 (1964). The constitution is a document, amended as of April 1968, that was initially compiled and adopted in 1938. Amendments were also made in 1940, 1944, 1947, 1948, 1951, 1952, 1956, 1960 and 1964. Counsel for the petitioner have been able to examine copies of the versions that were extant between 1938 and 1968, except those of 1944, 1947, 1951 and 1954. The provision quoted above does not appear in the 1938 or 1940 versions; it does appear in the 1948 version.

1965) (Cooper, J.) (jurisdiction upheld in action properly alleging denial of equal rights to nominate and vote; *Calhoun* distinguished since instant case involved no issue of reasonableness).

The decision below also conflicts with a series of Third Circuit decisions. In that circuit, "[M]erely because a particular violation is covered by both Title I and Title IV, a private pre-election suit under §102 is not barred." *Amalgamated Clothing Workers Rank and File Comm.* v. *Amalgamated Clothing Workers,* 473 F.2d 1303, 1306 (3d Cir. 1973). Accord, *DePew* v. *Edmiston,* 386 F.2d 710 (3d Cir. 1967).

II.

The decision of the court below is inconsistent with this Court's decision in *Moose Lodge No. 107* v. *Irvis* and conflicts with a decision of the Fourth Circuit.

The decision below on the second question presented in this petition conflicts with this Court's holding in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972),[4] and with the Fourth Circuit's *en banc* holding in *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964).

Moose Lodge, insofar as it is pertinent here, held that a "neutral" Liquor Control Board regulation, which required licensees to adhere to all provisions of their constitutions and bylaws, "place[d] state sanctions behind" dis-

[4] While *Moose Lodge* dealt with "state action" for purposes of 42 U.S.C. §1983, we believe the same standard applies to the question whether there is sufficient "governmental action" to trigger jurisdiction under 28 U.S.C. §1331.

criminatory bylaws. 407 U.S. at 177-79. This was held to constitute state action. 407 U.S. at 179.

The role played by the Liquor Control Board regulation in *Moose Lodge* is performed in this case by §§401(e) and 504 of the LMRDA, 29 U.S.C. §§481(e), 504, and by §9(h) of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. §159(h) (repealed in 1959). Section 504 makes it a crime for a member of the Communist Party to serve as an officer or employee of a labor union. Section 401(e) provides that a candidate's eligibility for office is "subject to section 504." Section 9(h) required labor unions to file non-Communist affidavits with the federal government.

The court below took the position that the record "does not indicate" that the union's affidavit requirement was imposed "in response to" §9(h) of the LMRA, which was repealed in 1959. The court stated that, had the record so indicated, a "different issue" would be presented. App., *infra*, p. 13a, n. 23.

Nothing in *Moose Lodge,* nor in any other precedent, requires a plaintiff to make such a causal showing. Rather, the very existence of these federal statutes "place[s] state sanctions", 407 U.S. at 178, behind otherwise private action and subjects the action thus sanctioned to constitutional limitations. Further, it is plainly inferable that there is an intimate relationship between the affidavit requirement and these federal statutes;[5] and there is nothing in

[5] The general anti-communist provisions in the IUOP constitution appear to have been added by amendment in 1948, the year after enactment of §9(h) of the LMRA, 29 U.S.C. §159(h). See, *supra*, n. 3, p. 15. The express requirement of a non-Communist affidavit as a condition to local office candidacy was not included in the

the record to suggest the contrary. Cf., *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963); *cert. denied,* 376 U.S. 939 (1964).

Although in *United States* v. *Brown,* 381 U.S. 437 (1965), §504 was held to be an unconstitutional bill of attainder in violation of Article I, §9 of the Constitution, we do not believe that this precludes a finding of "governmental action." In the first place, *Simkins* indicates that the unconstitutionality of a statute does not avoid a finding that the statute sanctions the otherwise private action. In *Simkins,* the issue was whether actions of the defendant private hospitals were "governmental action." The court found "governmental action," in the racially discriminatory policies of the hospitals because part of the Hill-Burton Act, 60 Stat. 1041 (1946), then codified at 42 U.S.C. §291e(f), and a regulation pursuant thereto, authorized construction of hospital facilities with federal funds on a "separate-but-equal" basis. The significance of *Simkins* for present purposes, is that the court found "governmental action" notwithstanding its further holding that the Hill-Burton Act and implementing regulation were unconstitutional.

Second, regardless of the status of §504, still another provision of the LMRDA, §401(e), 29 U.S.C. §481(e), remains in force and continues to sanction the respondents' non-Communist affidavit. The court below held that §401(e) does not sufficiently ratify the union's actions to convert them into government action because: "The enactment of §401(e) has neither enhanced the union's power over candidacy requirements nor diminished plaintiffs' rights."

1948 version of the constitution. It does appear in the 1952 version of the constitution in virtually the same form it takes in the 1968 version.

Appendix, *infra*, p. 12a. This holding, too, conflicts with the Fourth Circuit's decision in *Simkins*. The government statutes and regulations involved in that case also were permissive. As the Fourth Circuit held: "It is settled that governmental sanction need not reach the level of compulsion to clothe what is otherwise private discrimination with 'state action.'" *Simkins, supra*, 323 F.2d at 968.[8]

III.

The Court should rule on the scope of Section 101 (a)(2) of the LMRDA, the free speech provision of the LMRDA.

The third question presented furnishes this Court with the opportunity to rule for the first time on the substantive content of §101(a)(2), 29 U.S.C. §411(a)(2). The courts below did not reach this issue, but were this Court to hear the jurisdictional issues, we believe it would promote judicial efficiency for it to hear simultaneously the merits of the case.

The meaning of §101(a)(2) has been extensively litigated in the lower federal courts. This section has been held to protect libelous and defamatory statements, *Giordani* v. *Upholsterers International*, 403 F.2d 85 (2d Cir. 1968);

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[8] If certiorari is granted on this issue, petitioner will present additional argument that the requisite "governmental action" also flows from the fact ". . . that unions, although traditionally regarded as private entities, have been subjected to extensive governmental regulation and have been granted various powers by governmental agencies." Appendix, *infra*, p. 11a. Petitioner will also present argument that ". . . the failure of the Secretary of Labor to institute Title IV proceedings on his [petitioner's] original complaint amounts to an official participation in the unconstitutional acts of the defendants." Appendix, *infra*, p. 12a.

Cole v. *Hall,* 339 F.2d 881 (2d Cir. 1965), leafleting, *International Brotherhood of Boilermakers* v. *Rafferty,* 348 F.2d 307 (9th Cir. 1965); *Farowitz* v. *Associated Musicians, Local 802,* 330 F.2d 999 (2d Cir. 1964), the writing of newspaper articles, *Deacon* v. *Operating Engineers, Local 12,* 273 F. Supp. 169 (C.D. Cal. 1967), and picketing, *Graham* v. *Soloner,* 220 F. Supp. 711 (E.D. Pa. 1963).

Petitioner agrees with these decisions giving a liberal construction to §101(a)(2), and submits that, properly interpreted, the section should be enforced as a rough analog to the First Amendment to the United States Constitution. Under this interpretation, the respondents' non-Communist affidavit requirements would be declared unlawful.

IV.

If the action of the respondents is "governmental action," this Court should decide whether that action is unconstitutional.

The fourth question presented is important because the oath requirement, which the decisions below allow to stand, abridges petitioner's First and Fifth Amendment rights. This issue, like the preceding one, was not reached below, but we believe it would be most efficient for this Court to hear all the issues together.

First, on its face, the oath violates the First Amendment by impairing the free and effective presentation of diverse views in union elections. The right to vote, which is "preservative of all rights," *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886), is intimately related to the right of candidates, parties, and factions to be included on the ballot. See *Wil-*

liams v. *Rhodes,* 393 U.S. 23 (1968). Accordingly, exclusions from the ballot based on political views have been struck down. *Whitcomb* v. *Indiana Communist Party,* 410 U.S. 976 (1973), *aff'g per curiam,* —— F. Supp. —— (N.D. Ind. 1972) (state statute requiring an organization seeking certification as political party to file affidavit "that it is not affiliated with and does not cooperate with or have any relations with any foreign government" is unconstitutionally vague and overbroad);[7] *Feinglass* v. *Reinecke,* 48 F. Supp. 438 (N.D. Ill. 1942); *Communist Party of the United States* v. *Peek,* 20 Cal. 2d 536, 127 P.2d 889 (1942); *Imbrie* v. *Marsh,* 3 N.J. 578, 71 A.2d 352 (1950). As Professor Thomas I. Emerson has written:

> Qualifications for access to the ballot grounded upon conduct otherwise protected as expression would seem to present the clearest possible case for application of the full protection rule [of the First Amendment]. It is difficult to see how the social interest in internal security is served by exclusion of a political party from the political process. T. Emerson, *The System of Freedom of Expression* 202 (1970).

At the very least, the First Amendment limits the oath that may be imposed upon one seeking or holding office to a simple affirmation to uphold the Constitutions of the United States and the union. *Cole* v. *Richardson,* 405 U.S. 676 (1972); *Connell* v. *Higginbotham,* 403 U.S. 207 (1971). *Compare* U.S. Const., Art. II, §1, cl. 8; Art. VI, cl. 3.

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[7] Argument in the appeal of the companion case, *Communist Party of Indiana* v. *Whitcomb,* U.S. S. Ct. No. 72-1040 was conducted on October 16, 1973. Substantive issues similar to those asserted under this point in the Petition were briefed and argued in that appeal.

Second, the requirement of the international union constitution that candidates sign a "non-Communist affidavit," and the oaths required by the local in this case, are unduly broad, vague and uncertain. It is by no means clear that a so-called negative loyalty oath can ever be valid. In a series of decisions, this Court has made it clear that no negative loyalty oath that requires the affidavit to disclaim association with an organization can be valid, unless it requires both knowledge of the unlawful purposes of the organization and a specific intent to further those purposes. *Whitehill* v. *Elkins,* 389 U.S. 54 (1967); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966). Cf., *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964). Plainly, Article XXIII, subdiv. 1, §(b), of the constitution of the international union is invalid since it is not so limited.

Both oaths tendered to petitioner are also unconstitutional. (See, *supra,* pp. 4-5 where the oaths are quoted.) They are required only because of Article XXIII, subdiv. 1, §(b) of the international union's constitution and therefore are tainted by the infirmities of that provision. See *Whitehill* v. *Elkins,* 389 U.S. 54 (1967); *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966). Standing on their own bottoms, too, they are too vague. Considering the second oath tendered, which is the more specific of the two, a person may "act" pursuant to his beliefs lawfully or unlawfully. As this Court stated in *Baggett* v. *Bullitt,* 377 U.S. 360, 368 (1964):

> Teaching and advising are clearly acts . . . . The question put by the Court in *Cramp* [v. *Board of Public Instruction,* 368 U.S. 278 (1961)] may with equal force be asked here. Does the statute reach endorsement or support for Communist candidates for office? Does it

reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by the Communists or the Communist Party?

The oath, if not unduly vague, is overbroad. The oath appears to reach all "acting" including advocating the overthrow of the Government by force or violence. But such advocacy is not illegal unless "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1969).

Third, the affidavit requirement denies procedural due process of law. No mechanism is provided by which the candidate can receive clarification of the oath or may explain a refusal to take the oath. Such a failure denies due process. *Connell* v. *Higginbotham,* 403 U.S. 207 (1971).

An additional reason for granting certiorari on this issue is to rule on the viability of *American Communication Ass'n* v. *Douds,* 339 U.S. 382 (1950), which had sustained §9(h) of the LMRA, 29 U.S.C. §159(h). In their briefs submitted in the lower courts, the defendants placed their chief reliance, on the merits, on *Douds.* We believe that *Douds,* although never expressly overruled, has been severely undermined by more recent decisions. In *United States* v. *Brown,* the Ninth Circuit took precisely this view of *Douds,* 334 F.2d 488, 492-95 (9th Cir. 1964). This Court, voided §504 as a bill of attainder, without deciding the First Amendment question or reconsidering *Douds. United*

States v. *Brown*, 381 U.S. at 440. In view of the continued reliance placed on *Douds*, its continued vitality should be reviewed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 10, 1973

Opinion of the United States Court of Appeals for the Seventh Circuit

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

No. 72-1423
JOSEPH M. DRISCOLL,
Plaintiff-Appellant,
v.
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139,
Defendant-Appellee,
and
INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 70-C-55

JOHN W. REYNOLDS, *Judge.*

ARGUED APRIL 23, 1973 — DECIDED SEPTEMBER 11, 1973

Before SWYGERT, *Chief Judge,* CASTLE and BARNES*, *Senior Circuit Judges.*

CASTLE, *Senior Circuit Judge.* Plaintiff Joseph M. Driscoll instituted this action against Local No. 139 of the International Union of Operating Engineers seeking to force the Local to discontinue requiring all candidates for union office to execute a non-Communist affidavit. Because its by-laws required that its local unions demand such an affidavit, the international union intervened. On March 23, 1972, the district court dismisssed Driscoll's

* The Honorable Stanley N. Barnes, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

complaint for want of jurisdiction. *Driscoll* v. *International Union of Operating Engineers, Local 139*, 339 F. Supp. 757 (E.D. Wis. 1972).

The parties have stipulated to the facts of this case, which are succinctly reported in the district court opinion. *Id.* at 758-59. Briefly stated, Driscoll was denied the opportunity to run for the position of treasurer of Local 139 because he declined to execute an affidavit affirming that he was not a member of the Communist Party or any organization advocating the overthrow of the United States government.[1] After exhausting his internal union remedies, he filed a complaint with the United States Department of Labor pursuant to § 402 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 482 (1970) (the "LMRDA") charging that the affidavit requirement violated § 401 of the LMRDA.[2] After the Department of Labor declined to institute litigation on his behalf,[3] Driscoll filed this action in district court, alleging violations of section 101(a)(1), (2) and (5) of the LMRDA (29 U.S.C. §411(a)(1), (2) and (5)), and the Civil Rights Act of 1871 (42 U.S.C. §1983).

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[1] The affidavit which Driscoll originally refused to sign contained the following language:

> I swear that I am not at the present time or have ever been [sic] a member of the Communist Party or any other subversive organization dedicated to or advocating the overthrow of the Government of the United States.

The oath was subsequently revised to the following form:

> I swear that I am not a member of the Communist Party or other organization that advocates the overthrow of the United States Government by force or violence, knowing of and sharing in such advocacy and acting pursuant to the teaching that the United States Government should be overthrown by such means.

Driscoll refused to sign this version of the oath also.

[2] § 401 of the Act, 29 U.S.C. § 481, states in pertinent part:

> (e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed).
>
> . . .

United States v. *Brown*, 381 U.S. 437 (1965), struck down the provisions of § 504 making it a crime for a member of the Communist Party to serve as an officer or employee of a labor union because they constituted a "bill of attainder" outlawed by article I, § 9 of the United States Constitution.

[3] The Department of Labor notified Driscoll that it had decided to close his case because "it had been determined that this case is not suitable for litigation under Section 402 of the Act." No further explanation was given.

The district court rejected plaintiff's constitutional arguments, finding that the action of Local 139 in promulgating and enforcing the affidavit requirement did not constitute governmental action which could be regulated by constitutional protections. *Id.* at 760-61. The court also found that the invocation of the LMRDA as the statutory basis for Driscoll's suit was barred by provisions of that same act making complaint to the Secretary of Labor the exclusive remedy for the denial of one's right to be a candidate for union office. *Id.* at 762. Accordingly, it dismissed the complaint for want of federal jurisdiction. Plaintiff appealed, and presses in this court the arguments that the district court had jurisdiction pursuant to both the LMRDA and the first and fifth amendments to the United States Constitution.

I. Jurisdiction Under the Labor-Management Reporting and Disclosure Act of 1959.

Appellant Driscoll argues that the district court erred in concluding that it had no jurisdiction over his complaint under § 102 (29 U.S.C. § 412)[4] because defendants have violated § 101(a)(1), (a)(2) and (a)(5). On this appeal he places his primary reliance on § 101(a)(2)[5] by arguing that defendants have infringed upon his right of free speech by denying him the right to run for union office.

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[4] Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violaion occurred, or where the principal office of such labor organization is located.

[5] Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business property before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Driscoll's attempt to rely upon § 101(a)(2), however, must overcome an initial hurdle posed by the ambiguity of certain language of the LMRDA and by the interpretation of this language in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964). The ambiguity arises from the fact that two separate titles of the LMRDA arguably provide remedies to plaintiff Driscoll in this action. Title I allows a private suit pursuant to §§ 101(a)(2) and 102 to vindicate the denial of the right of free speech, and Title IV provides for complaint to and an action brought by the Secretary of Labor to vindicate Driscoll's right of candidacy for union office under § 401(e), 29 U.S.C. § 481(e),[6] which, by the terms of the statute, is the exclusive means of challenging an election already conducted. 29 U.S.C. § 483.

The district court held that it had no jurisdiction under § 102 over a private suit to void a restriction on candidacy for union office, for, the right of candidacy being an explicit Title IV right, the provisions of Title IV providing for complaint to and suit by the Secretary of Labor to protect this right was the only remedy available. In reaching this conclusion, the court relied upon *Calhoon* v. *Harvey, supra*, where the Supreme Court dismissed a Title I suit to strike down restrictions on eligibility for union office and held that jurisdiction under 29 U.S.C. § 412 could not "be upheld by reliance in whole or in part on allegations which in substance charge a breach of Title IV rights." 379 U.S. at 138.

Driscoll seeks to avoid the application of *Calhoon* to the facts of his particular case on the ground that his case, unlike *Calhoon*, involves a direct infringement upon his Title I right to freedom of speech. He notes that plaintiff Calhoon sought to attack the requirement that candidates be union members for 5 years and have accumulated 180 days of seatime in two of the past three years; here, however, Driscoll alleges that the denial of candidacy constitutes a punishment for exercising his right to free speech as guaranteed by § 101(a)(2). Consequently, he argues, this court should have jurisdiction to strike down the requirement just as other courts have had jurisdiction to strike down other union sanctions

[6] See note 2, *supra*.

upon the free speech of their officers[7] and members.[8] If such jurisdiction is not established, he submits, the holding of the district court will enable any union to avoid the direct judicial review provisions of Title I simply by veiling its repressive measures in the form of requirements for elective office.

Despite the factual differences between *Calhoon* and the instant case, we are still bound by the maxim of *Calhoon* that

> . . . disputes . . . basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title.

379 U.S. at 141. Since Driscoll's allegations "basically relate" to eligibility and charge "in substance" that he has been denied the right to run for office in his union, he is therefore stating a cause of action which can be enforced only under the provisions of Title IV calling for complaint to and suit by the Secretary of Labor as the exclusive remedy.[9] The fact that six of the members

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[7] *Grand Lodge of the International Association of Machinists* v. *King*, 335 F.2d 340 (9th Cir.), cert. denied, 379 U.S. 920 (1964), *Salzhandler* v. *Caputo*, 316 F.2d 445 (2d Cir.), cert. denied, 375 U.S. 946 (1963).

[8] *See, e.g., International Brotherhood of Boilermakers* v. *Rafferty*, 348 F.2d 307 (9th Cir. 1965), *Farowitz* v. *Associated Musicians of Greater New York, Local 802*, 330 F.2d 999 (2d Cir. 1964).

[9] On appeal, defendants have apparently abandoned the argument that the district court had no jurisdiction over Driscoll's LMRDA allegations, and have contended instead that, although jurisdiction exists, the complaint does not state a cause of action. Defendants have reasoned that § 101(a)(2) permits a union to impose "reasonable rules as to the responsibility of every member toward the organization as an institution," and that the imposition of the affidavit requirement was such a reasonable rule. To support this theory, they point out that because Congress passed § 502 of the LMRDA (which prohibited Communists from taking union office) at the same time as § 101, it must have determined that any union rule imposing an anti-Communist affidavit requirement was reasonable.

We do not read *Calhoon* as admitting jurisdiction over plaintiff's complaint so as to make it necessary to reach defendant's argument and the problems it raises. See note 23, *infra*. *Calhoon* involved both the failure to state a claim and the lack of jurisdiction. The allegations of the complaint asserting a violation of § 101 (a)(1) were not sufficient to state a claim. Upon closer analysis, the complaint also alleged in substance that the restrictions on candicacy for union office were unreasonable; the Court held that such a claim was not within the

of the *Calhoon* court subscribed to the majority opinion in the face of the observation made by Justice Stewart in concurrence—made also by appellant here—that unions could cloak Title I violations in terms of eligibility requirements challengable only under Title IV gives further compulsion for applyng *Calhoon* to the facts of this case.[10]

We recognize one exception to the broad mandate of *Calhoon*. In *Schonfeld* v. *Penza*, 477 F.2d 899 (2d Cir. 1973), plaintiff Schonfeld and fellow union members attacked a disciplinary decision of a union which removed Schonfeld from office and declared that he be ineligible to run for any other union office until June, 1973. Although the court recognized that the complaints attacked the deprivation of what appeared to be Title IV rights, it nevertheless concluded that jurisdiction existed under § 102 because plaintiffs had presented the question "whether the sanctions on Schonfeld in the peculiar context of the history of union fractionalism presented here impede or infringe upon the free speech and association rights of union members protected by § 101(a)(2)." *Id.* at 903. But the court also recognized that such a determination

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[9] (Continued)
jurisdiction of the district court because it fell within Title IV. Thus, *Calhoon* requires analysis of the substance (379 U.S. at 138) and basic nature (*Id.* at 141) of the complaint in order to determine whether jurisdiction exists. Such an approach was employed in *Schonfeld* v. *Penza*, 477 F.2d 899 (2d Cir. 1973), discussed *infra*.

[10] The legislative history of the LMRDA indicates Congress' recognition that the right of candidacy would be enforced in a manner separate from the right to freedom of speech. When Senator Kuchel introduced his amended version of the bill of rights, which constitutes much of the present Title I of the LMRDA, the question arose as to whether the enumeration of rights in his bill would exclude other rights not explicitly listed therein. In response, Senator Cooper noted that the right of candidacy was guaranteed in another section of the bill which had already been proposed:

> The bill itself, in section 301 [the precursor to § 401 of the final version] . . . guarantees to every member of a union the right to be a candidate. I think that answers the question.
>
> I think it important to state for the legislative history that the enumeration of the rights mentioned does not exclude other rights. It is so provided in another section of the amendment.

106 Cong. Rec. 6720 (1959). Senator Kennedy then read the text of the present version of § 401(e), and, without mentioning the different procedure for the enforcement of the right of candidacy guaranteed by it, emphasized that such a right was additional to those granted in the bill of rights. *Id.*

of whether jurisdiction existed depended upon a close analysis of the basic thrust of the complaint, and that one could not obtain jurisdiction by merely alleging the denial of Title I rights when Title IV rights were essentially involved:

> The competing values between Title I rights and Title IV procedural requirements are best reconciled, in our opinion, by limiting initial federal court intervention to cases where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union.

Id. at 904. Since the complaint filed by the plaintiffs had demonstrated a purposeful program of suppressing dissent, and since the "lengthy history of intra-District warfare" proved that plaintiff had not made "mere conclusionary allegations," the court found jurisdiction under Title I. *Id.*

We find that the complaint of Driscoll in the instant case, although alleging the denial of Title I rights, is insufficient to invoke jurisdiction under the rationale of *Schonfeld.* The complaint does not allege that the candidacy requirement is part of a purposeful program of suppressing any expression of dissent by plaintiff. Nor does it appear that the eligibility requirement is a discriminatory, *ad hoc* device calculated to perpetuating certain individuals in office. We hold that this case is not factually distinguishable from *Calhoon* or similar to *Schonfeld* to establish jurisdiction under Title I.

Driscoll also attempts to avoid the preclusive effect of Title IV by submitting that he is seeking pre-election remedies which are enforceable under Title I, and not post-election remedies which are available only through the Secretary of Labor.[11] In support of his position he

[11] Plaintiff's complaint did not state when the election was to be held, but the parties stipulated to the fact that it was held from July 13 to August 16, 1968. Since the by-laws of defendant Local 139 require the election of officers every 3 years, it is assumed that the next election will be held in summer, 1974. If plaintiff had alleged that the election had been already held or if he had prayed for relief regarding a specific election, § 403 would apparently require dismissal of his complaint because the exclusive post-election remedy is through the

cites holdings from various cases and dicta from others[12] which purportedly support his position. We appreciate the merits of the arguments for accepting such a distinction between pre-and post-election remedies, and recognize that only a limited standard of review is applicable to post-election suits brought under Title IV by the Secretary of Labor.[13] But we are bound by *Calhoon* v. *Harvey, supra,* which itself was a pre-election case and which impliedly required that the election first be held before any Title IV remedies be made available to the plaintiffs. *See also, Amalgamated Clothing Workers of American Rank and File Committee* v. *Amalgamated Clothing Workers,* 473 F.2d 1303, 1306-07 (3d Cir. 1973), *Kempthorne* v. *United Transportation Union,* 457 F.2d 551, 553 (7th Cir. 1972); *Schonfeld* v. *Raftery,* ..... F. Supp. ..... (S.D.N.Y. 1973), 41 U.S.L.W. 2650, 2651 (June 5, 1973), *Colpo* v. *Highway Truck Drivers and Helpers, Local 107,* 201 F. Supp. 307 (D. Del. 1961); vacated as moot, 305 F.2d 363 (3d Cir.), cert. denied, 371 U.S. 890 (1962).

Plaintiff argues finally that the policy considerations relied upon by the Supreme Court to justify its *Calhoon* decision[14] do not apply to this case involving sharply-

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[11] (Continued)

Secretary. The ease with which one can avoid § 403 by omitting such allegations or prayers emphasizes the wisdom of the district court's holding that the absence of such pleadings does not confer jurisdiction.

[12] Pre-election suits which have successfully asserted jurisdiction have usually involved arbitrary discrimination against individuals or groups of members, *DePew* v. *Edmiston,* 386 F.2d 710 (3d Cir. 1967), *Beckman* v. *Local 46, International Ass'n of Bridge Workers,* 314 F.2d 848 (7th Cir. 1963), *Schonfeld* v. *Raftery,* 335 F.Supp. 846 (S.D.N.Y. 1971), or statutes expressly authorizing the filing of a particular kind of suit *Yablonski* v. *United Mine Workers,* 305 F.Supp. 868 (D.D.C. 1969).

In *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 531 (1972), the Court noted that "[w]ith respect to elections not yet conducted, the statute provides that existing rights and remedies apart from the statute are not affected." This dicta apparently recognizes that the only pre-election remedies to protect rights enumeraed in Title IV are those existing outside the LMRDA.

[13] Section 402 of the act, 29 U.S.C. § 482, provides that the Secretary shall bring a civil action to set aside an election which he finds probable cause to believe was tainted by a violation of Title IV. The court, however, can void an election only if it finds that a violation of § 401 has occurred and that the violation "may have affected the outcome of the election."

[14] *Calhoon* v. *Harvey, supra,* 379 U.S. at 140.

defined legal free speech issues which are not within the expertise of the Secretary of Labor. We note only that Congress has mandated by its enactment of the LMRDA that the Secretary of Labor act as a clearing house for any litigation concerning union election policies and that unions be spared from defending against unnecessary litigation. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 532 (1972).

We conclude that Driscoll's complaint does not allege facts which would confer jurisdiction upon the district court to adjudicate his claims under § 101(a)(2).

Driscoll has also alleged that the affidavit requirement is violative of his rights under § 101(a)(1) of the LMRDA in that it deprives him of equal rights[15] and § 101(a)(5) in that it subjects him to improper disciplinary action.[16] We find that neither claim confers jurisdiction upon the district court. In interpreting the equal rights clause of § 101(a)(1) in *Calhoon* v. *Harvey, supra*, 379 U.S. at 139, the Supreme Court held that this section requires only that a qualification on candidacy be imposed equally upon all members. The affidavit requirement is such a uniform requirement. Similarly, we do not believe that Driscoll was necessarily entiled to a hearing before he was "disciplined" by the denial of the right to run for office,[17] since, as a practical matter, no hearing was needed to determine that he did not sign the affidavit. *Hurwitz*

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[15] Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Driscoll's complaint did not allege in which way the affidavit requirement deprived him of his equal right to nominate, vote, attend meetings, and participate in the business of union meetings under § 101(a)(1).

[16] Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

[17] *Schonfeld* v. *Penza*, 477 F.2d 899, 904 (2d Cir. 1973), *Matire* v. *Laborers Local 1058*, 410 F.2d 32, 35-36 (3d Cir.), cert. denied, 396 U.S. 903 (1969).

v. *Directors Guild of America*, 364 F.2d 67, 73 n.8 (2d Cir.), cert. denied, 385 U.S. 971 (1966).

Plaintiff has finally argued that the district court should have found jurisdiction pursuant to 28 U.S.C. § 1337, which grants original jurisdiction over any civil action arising under any Act of Congress regulating commerce. A personal suit asserting the right to be a candidate in a union election, however, is not one "arising under any Act of Congress regulating commerce" within the meaning of § 1337, since Congress established a separate basis of jurisdiction for Title IV actions, and *Calhoon, supra*, permits only the Secretary of Labor to bring suit pursuant to the power conferred upon him by § 402. Thus, if no cause of action arises under the LMRDA, no jurisdiction lies under 28 U.S.C. § 1337.[18] *Colpo* v. *Highway Truck Drivers and Helpers, Local 107, supra*, 201 F. Supp. at 314.

II. Jurisdiction Under the United States Constitution.

Driscoll's complaint also alleged that the refusal of defendant Local 138 to allow him to run for office violated his rights under the first and fifth amendments of the United States Constitution. He asserted jurisdiction for these allegations under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.[19] To support his jurisdictional claim he alleged

[18] For the contrary viewpoint see *Serio* v. *Liss*, 300 F.2d 386 (3d Cir. 1961), *Postma v. International Brotherhood of Teamsters Local 294*, 229 F. Supp. 655 (N.D.N.Y. 1964), *McKeon* v. *Highway Truck Drivers and Helpers Local 107*, 223 F. Supp. 341 (D.Del. 1963). We find that these cases are distinguishable for various reasons, and respectfully decline to follow them to the extent to which they are inconsistent with this opinion.

[19] 28 U.S.C. § 1331 provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

that the refusal to slate him "was based under color of statute, particularly, Title 29 U.S.C. Section 481(e)."[20] The district court found no jurisdiction under these sections, holding that Driscoll had failed to demonstrate that the essentially private action of the union was so clothed with governmental authority as to be considered "state" or "federal" action that is governed by the Constitution.

On appeal, Driscoll presents two general lines of analysis to support his contention that the activity of the defendants in imposing the oath requirement constituted governmental action contrary to the first and fifth amendments. Driscoll argues initially that the economic power of unions and their involvement with the government belie any suggestion that they are voluntary organizations, and mandate the imposition of constitutional restraints upon their activities. There is no dispute that unions, although traditionally regarded as private entities,[21] have been subjected to extensive governmental regulation and have been granted various powers by governmental agencies. But governmental regulation or participation in some of the affairs of unions does not consequently make every union activity so imbued with governmental action that it can be subjected to constitutional retraints. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972). To be regulable under constitutional standards through § 1331 or § 1983, the very activity of a private entity which a plaintiff challenges must be supported by state action, *Doe* v. *Bellin Memorial Hospital*, 479 F.2d 756, 761 (7th Cir. 1973), *Powe* v. *Miles*, 407 F.2d 73, 81 (2d Cir.

[20] Plaintiff's complaint alleged no facts showing "state action" to suport invocation of § 1983; nor does he argue any such facts on appeal. The question, then, is whether the action of the defendants is subject to constitutional restraints under 28 U.S.C. § 1331. The parties have argued this issue with the implicit assumption that the same quantum of involvement with the federal government would confer jurisdiction under § 1331 as would state or local government intervention under § 1983, even though the wording of the two statutes is different.

[21] Labor unions have been traditionally regraded as private entities, despite the imposition of regulatory provisions upon them. *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950), *Oliphant* v. *Brotherhood of Locomotive Trainmen and Enginemen*, 262 F. 2d 359, 363 (6th Cir. 1958), cert. denied, 359 U.S. 935 (1959). The same view was expressed during the debates preceding enactment of the LMRDA.

1968), that significantly fosters or encourages that activity. *Moose Lodge No. 107* v. *Irvis, supra,* 407 U.S. at 173, *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 656 (7th Cir.) (*en banc*), cert. denied, 409 U.S. 1114 (1973), *Todd* v. *Joint Apprenticeship Comm.*, 223 F. Supp. 12, 20 (N.D. Ill. 1963). For Driscoll to prevail in this jurisdictional claim, he must demonstrate that the governmental activity significantly encouraged defendants in their promulgation and enforcement of the anti-Communist oath. Only then will there be "governmental action" to bring the operation of the first and fifth amendments into play.

Plaintiff's second line of analysis suggests two particular ways in which the federal government is involved in the activity of the defendants. First, he notes that defendants relied upon § 401(e) of the LMRDA (29 U.S.C. § 481(e)) as a justification for their imposition of the affidavit requirement, for they argued that it was a reasonable qualification for candidacy within the meaning of that statute. Secondly, he argues that the failure of the Secretary of Labor to institute Title IV proceedings on his original complaint amounts to an official participation in the unconstitutional acts of the defendants. Neither ground shows significant federal encouragement of the affidavit requirement to trigger constitutional protections. It is apparent that before the enactment of § 401, unions had the power to exclude whomever they wished from membership or candidacy for union office (subject to some restrictions regarding discrimination on account of race, color, creed, and sex). *See, e.g., International Association of Machinists* v. *Friedman*, 252 F.2d 846 (D.C. Cir. 1958), *Callahan* v. *Order of Railway Conductors*, 169 Wis. 43, 171 N.W. 653 (1919); *but see Hurwitz* v. *Directors' Guild of America, Inc., supra, Crossen* v. *Duffy*, 90 Ohio App. 252, 103 N.E.2d 769 (1951). The enactment of § 401(e) has neither enhanced the union's power over candidacy qualifications nor diminished plaintiff's rights, *Lucas* v. *Wisconsin Electric Power Co., supra,* 466 F.2d at 647; nor does the failure of Congress to go further in outlawing all restrictions upon candidacy transform defendants' conduct into governmental action. We also refuse to find that the decision of the Secretary of Labor not to act under the limited powers given to him under

Title IV[22] established governmental action. As Mr. Justice Rehnquist recognized in *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S. at 175-76 n.3, a regulatory agency must affirmatively approve or endorse the activity of a private entity for such activity to become subject to the constitution. Such is not the case here.[23] We conclude that the district court correctly concluded that defendants are not engaged in governmental action to invoke the operation of either 29 U.S.C. § 1331[24] or 42 U.S.C. § 1983.

Our finding that the district court correctly dismissed this case for want of jurisdiction renders it unnecessary to pass upon the arguments relating to whether a body engaging in governmental action or acting under color

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[22] See note 13, *supra*. The decision of the Secretary of Labor to close Driscoll's case was undoubtedly influenced by his judgment as to his ability to prove either that the affidavit requirement was an unreasonable restriction on candidacy under § 401(e) of the LMRDA or that it may have affected the outcome of the election.

[23] A different issue would be presented had the defendants imposed the affidavit requirement in repsonse to the requirements of § 9(h) of the Labor Management Relations Act of 1947, 29 U.S.C. § 159(h) (repealed in 1959) and continued it thereafter. The record does not indicate that this was the case.

Because of our holding concerning lack of jurisdiction under the LMRDA in section I of this opinion, we do not reach the question of whether recognition of an anti-Communist oath as a reasonable restriction upon freedom of speech within the meaning of § 101(a)(2) would constitute governmental action. This question would arise in two forms. The first would be whether reliance upon congressional intent found in legislative history would be any different from reliance upon an explicit congressional statute for the purposes of finding government action. The second would be whether judicial declaration of the reasonableness of the affidavit requirement would constitute state action; for the legislative history of § 101(a)(2) indicates that the courts have the onus of defining and restricting rights under Title I:

> Mr. Curtis. Is it true that under the Senator's (Mr. Kuchel's) amendment there are some rights which are not granted equally to all members of the union?
>
> Mr. Kuchel. That would be true only if one of the courts of the United States, which was called upon to sit in judgment as to whether the rights were violated, determined that it was reasonable on the part of a specific labor organization to make such an excision.

105 Cong. Rec. 6719 (1959). *See also Semancik* v. *United Mine Workers of America District #5*, 466 F.2d 144, 155-56, 156 n.11 (3d Cir. 1972).

[24] Because of our holding, we do not reach the question of whether Driscoll had to or did meet the $10,000 jurisdictional requirement imposed by 28 U.S.C. § 1337.

of federal law could impose the oath involved in this case. The judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Opinion of the United States District Court for the Eastern District of Wisconsin

UNITED STATES DISTRICT COURT

E. D. WISCONSIN

March 23, 1972

Civ. A. No. 70-C-55

JOSEPH M. DRISCOLL,

Plaintiff,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 139,

Defendant,

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, A.F.L.-C.I.O.,

Intervenor-Defendant.

OPINION AND ORDER

REYNOLDS, Chief Judge.

This is a civil action challenging as incompatible with the Constitution and statutes of the United States a provision of the constitution of the International Union of Operating Engineers, AFL-CIO, which makes candidacy for local union office contingent upon execution of a non-Com-

munist affidavit. Plaintiff requests a declaratory judgment and an injunction permanently enjoining defendants from excluding plaintiff from candidacy because of his refusal to comply with the non-Communist affidavit requirement. This matter is presently before me on defendants' motion for dismissal for lack of jurisdiction or, alternatively, for summary judgment.

The facts are undisputed and are as follows. On June 12, 1968, plaintiff Driscoll, a member in good standing of defendant Local No. 139, was nominated for the office of treasurer of the Local. Upon being nominated, the union sent him two documents for his signature—an acceptance of nomination and a non-Communist affidavit—both of which were required by the International's constitution. Driscoll signed the acceptance of nomination but mailed back the non-Communist affidavit without signature and marked with a large question mark.

The Business Manager of Local No. 139, in a letter dated July 3, 1968, called Driscoll's attention to the fact that he would not be eligible to run for office unless he executed the affidavit by July 8, 1968. On July 5, Driscoll responded that he had not done so because "the United States Supreme Court ruled that section of the Labor Law unconstitutional." On July 8, Local No. 139's election committee ruled that Driscoll was ineligible to run for office because of his failure to execute a non-Communist affidavit as required by the International's constitution.

On July 10, plaintiff was informed of his ineligibility. The next day plaintiff wrote to the General President of the International Union restating his conviction that execution of the non-Communist affidavit was unconstitutional and requesting that the election committee be instructed to place his name on the ballot. By letter dated July 26, 1968, the

General President responded that he was unable to comply with Driscoll's request. Driscoll promptly appealed that decision to the General Executive Board of the International Union. On January 15, 1969, after several exchanges of letters, he was offered a personal hearing before a panel of the General Executive Board. Two months later he was informed by letter from the General Secretary-Treasurer of the International Union that the appeal had been denied.

On March 11, 1969, Driscoll filed his complaint with the United States Department of Labor in accordance with the provisions of §402 of the Labor Management Reporting and Disclosure Act ("LMRDA").[1] The Labor Department processed the complaint and on May 1, 1969, informed Driscoll that his "complaint to the Secretary of Labor alleging violations of Section 401[2] of the * * * (LMRDA)

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[1] Section 402 (Title 29 U.S.C. §482(a)):

"(a) A member of a labor organization—

"(1) who has exhausted the remedies available under the constitution and by-laws of such organization and of any parent body, * * *

* * * * *

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section [401] of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). * * *"

[2] Section 401(e) (29 U.S.C. §481(e)):

"(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) * * *."

The provision referred to as section 504 (29 U.S.C. §504) reads in relevant part as follows:

"(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part

* * * " had been investigated, and that it had "been determined that this case is not suitable for litigation under Section 402[3] of the Act."

The constitution of the International Union (Art. XXIII, Subdivision 1, Section (b), pp. 83-84) requires the execution of a non-Communist affidavit by candidates for union office but does not prescribe the language to be used therein. This is left to the discretion of the Executive Board of the Local Union (Art. XXIII, Subdivision 1, Section (d), p. 85). Driscoll's refusal, however, to execute the non-Communist affidavit does not turn upon the particular language of the affidavit which he was required to sign. That affidavit has, at any rate, been revised for use in the 1971 elections of Local No. 139.[4] Rather plaintiff's position is that a non-

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of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics law, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of [title II or III of this Act], or conspiracy to commit any such crimes, shall serve—

"(1) as an officer * * * or other employee * * * of any labor organization, * * *

* * * * *

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment. * * *."

[3] Section 402 (29 U.S.C. §482(b)):

"(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this [title] has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization * * * to set aside the invalid election, if any, * * *."

[4] The affidavit tendered to Driscoll by Local No. 139 reads as follows:

"I swear that I am not at the present time or have ever been a member of the Communist Party or any other subversive

Communist affidavit, regardless of form, violates his statutory and constitutional rights as announced in United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965).

Plaintiff alleges as the bases for subject matter jurisdiction for this action Title 28 U.S.C. §§ 1331,[5] 1337,[6] 1343,[7] and Title 29 U.S.C. § 412.[8] I am of the opinion, however,

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organization dedicated to or advocating the overthrow of the Government of the United States."

The revised affidavit states:

"I swear that I am not a member of the Communist Party or other organization that advocates the overthrow of the United States Government by force or violence, knowing of and sharing in such advocacy and acting pursuant to the teaching that the United States Government should be overthrown by such means."

[5] "(a) The district courts shall have original jurisdiction of all civil actions * * * [which arise] under the Constitution, laws, or treaties of the United States."

[6] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

[7] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[8] "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. * * *"

that none of these bases are applicable and, accordingly, that the complaint *must be dismissed for lack of jurisdiction.*

JURISDICTION BASED ON THE CONSTITUTION

Plaintiff alleges jurisdiction under Title 28 U.S.C. §§ 1331 and 1343 on the basis that this action arises under the Constitution. Defendants have, plaintiff argues, infringed upon his rights as guaranteed by the First and Fifth Amendments. The First and Fifth Amendments, however, only protect individual rights from infringement by federal and (through the Fourteenth Amendment) state governments. Thus, these amendments cannot be applied to the private sector except when private action is so clothed with governmental authority as to be considered "state" or "federal."

Plaintiff's position is that governmental action may be found in defendants' activities because trade unions play a vital role in the country and because they are subject to federal regulations. There is, of course, no question but that unions are subject to federal regulation[9] or that they are vital to our nation's economy; indeed, the latter is the principal reason for the former.[10] But the "question in a

[9] See, e.g., Title 29 U.S.C.

[10] See, e.g., Title 29 U.S.C. §401, the declaration of the findings, purposes, and policy for the Labor Management Reporting and Disclosure Act:

> "The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the

case like that before us is not whether *any* state involvement can be found; manifestly it can. The question is whether the state involvement that is undeniably present is involvement of a kind and extent that is 'significant' in terms of present-day state action doctrine."[11] Under the present state of the law I do not believe that a private organization's actions may be labeled "state" or "federal" merely because those actions have a substantial impact on our economy, an economy grounded upon private enterprise by definition and/or merely because Congress, in order to fulfill its modern day responsibilities under the commerce clause, finds it necessary to regulate such private enterprise.[12] The case at hand is distinguished from that line of cases finding state action in private activities. Defendants "are not engaged in the exercise of any governmental function, nor do they possess or exercise any delegated power of a governmental nature."[13] Nor is this a case like Seidenberg v. McSorleys' Old Ale House, Inc., 317 F.Supp. 593 (S.D.N.Y. 1970), which found state action in a private business (a tavern) operated by virtue of a state license and which was the subject of extensive government regulation in almost every facet of its operation.

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objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations."

[11] Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 604 (S.D.N.Y. 1970).

[12] Cf. Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 262 F.2d 359 (6th Cir. 1958).

[13] Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470, 476 (7th Cir. 1970).

Finally, it is not argued in the instant case that defendants are the recipients of either government funds or special privileges.

JURISDICTION BASED ON THE LMRDA

Plaintiff alleges that the union's requirement of a non-Communist affidavit from all candidates for union offices constitutes a violation of Title I § 101 of the LMRDA in that the affidavit requirement denies him equal protection, freedom of speech and assembly, and due process.[14] It is

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[14] Section 101 (Title 29 U.S.C. §411) reads in pertinent part:

"(a) (1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

"(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

• • • • •

"(5) Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges;

further alleged that defendants' affidavit requirement is imposed pursuant to authority permitted unions under LMRDA.[15] Accordingly, it is argued that this court has jurisdiction under Title 28 U.S.C. §§ 1331, 1337, 1343, and Title 29 U.S.C. § 412. I find that this argument is not persuasive.

Congress, when it adopted the LMRDA, chose to incorporate into that Act bases for federal court jurisdiction separate and distinct from those set out in Title 28 U.S.C. §§ 1331, 1337, and 1343. At least in a case such as this, it cannot be said that §§ 1331, 1337, and 1343 jurisdiction arises on the bases of violations of the LMRDA. Rather, the court must find its grant of jurisdiction within the Act itself.[16]

Turning then to the LMRDA, there are two possible bases for jurisdiction. First, § 102 allows the individual

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(B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

"(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions *of this section shall be of no force* or effect." (Emphasis added.)

[15] Title 29 U.S.C. §481(e):

"(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. * * *"

[16] Colpo v. Highway Truck Drivers and Helpers, Local 107, 201 F. Supp. 307 (D. Del. 1961), vacated as moot 305 F.2d 362 (3rd Cir. 1962), cert. denied 371 U.S. 890, 83 S. Ct. 188, 9 L.Ed.2d 123 (1962).

union member to bring an action in this court seeking redress for violations of § 101; and second, § 402 allows the Secretary of Labor (and only he) to bring an action for violation of Title IV rights. (Title IV deals with union elections and eligibility to be a candidate.) In that the Secretary of Labor has not brought the instant action, this court has jurisdiction only if it can be found under § 102.

Plaintiff contends that the court has jurisdiction under § 102, arguing that the non-Communist affidavit requirement is directly related to rights of free speech guaranteed under 29 U.S.C. § 411(a) (2) (§ 101) and has effects which reach far beyond mere eligibility for elective office. That argument is persuasive. One very similar to it, however, was rejected by the Supreme Court in Calhoon v. Harvey, 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964). The Court noted there that jurisdiction under § 102 cannot "be upheld by reliance in whole or in part on allegations which in substance charge a breach of Title IV, [union election] rights" (at p. 138, 85 S.Ct. at p. 295), and held that "possible violations of Title IV of the Act regarding eligibility [for union office] are not relevant in determining whether or not a district court has jurisdiction under § 102 of Title I of the Act" (at pp. 139-140, 85 S.Ct. at p. 296).

Colpo v. Highway Truck Drivers and Helpers, Local 107, 201 F.Supp. 307, 309 (D.Del.1961), adequately summarizes the jurisdictional problem which is at issue here:

> "The plaintiff seeks judicial protection of his asserted right to be a candidate. Perusal of Title I satisfies the court that nowhere among the rights enumerated therein is the right to be a candidate found. By its express terms, § 102 restricts Federal District Court jurisdiction to those causes asserted by plaintiffs

whose Title I rights have been violated. Since the right of candidacy is not afforded by Title I, no remedy for its violation is available under § 102 of the LMRDA. • • •

"The right of candidacy is derived exclusively from the provisions of Title IV, § 401(e). • • • "

It is therefore ordered that the defendant's and the intervening defendant's motion for dismissal be and it hereby is granted for want of jurisdiction over the subject matter.

Statutory Provisions

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT,
29 U.S.C. §411(a)(2)

* * * * *

(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * * * *

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT,
29 U.S.C. §412

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT,
29 U.S.C. §481(e)

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at the last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter.

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT,
29 U.S.C. §482

(a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under

the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 481 of this title, or

(2) that the violation of section 481 of this title may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 481 of this title, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT,
29 U.S.C. §504

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, . . . No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

• • • • •

28 U.S.C. §1331(a)

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

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Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH M. DEBICCARI,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AND THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNIONS

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-911

JOSEPH M. DRISCOLL,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AND THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNIONS

The opinions below, the basis of this Court's jurisdiction, and the constitutional and statutory provisions involved are set out at pp. 1-3 and 1a-31a of the petition.

QUESTIONS PRESENTED

1) Whether a private suit challenging the legality of a union rule requiring candidates for office to file "non-communist" affidavits is cognizable under Title I of the Labor Management Reporting and Disclosure Act of 1959, even though the suit is "basically relat[ed] * * * to eligibility of candidates for office," (*Calhoon* v. *Harvey*, 379 U.S. 134, 141).

2) Whether the LMRDA, which, as enacted, prohibited members of the communist party from holding union office

(see § 504 since ruled unconstitutional in *United States* v. *Brown*, 381 U.S. 437), also prohibited unions, through § 101(a)(2), from requiring candidates for office to file "non-communist" affidavits.

3) Whether the decision of a union to utilize a "non-communist" affidavit, is "state action" subject to direct judicial supervision pursuant to the provisions of the Constitution of the United States, or private action subject to state and federal legislative regulation.

4) Whether, if the Constitution is directly applicable here, the "non-communist" affidavit utilized by these Unions is constitutional.

ARGUMENT[1]

The petition, as we now show, requests further review: of a narrow question, decided in principle by this Court in *Calhoon* v. *Harvey*, 379 U.S. 134, and as to which there is no conflict in the circuits, concerning the interrelationship between Titles I and IV of the LMRDA; and of a question concerning the scope of the "state action" concept that is of minimal practical import since it turns on the present effects of a provision (§ 504 of the LMRDA) no longer

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[1] This case was decided on a stipulation of facts between the parties. The petition's statement of the case (Pet. 3-7) sets out the essence of that stipulation accurately with one exception: nothing in the record supports the assertion (Pet. 4) that Local 139's revision of its original affidavit was based on a "recogni[tion]" that that affidavit suffered from "constitutional infirmities." With this one caveat we, therefore, accept the petition's statement of the case.

operative (see *United States* v. *Brown*, 381 U.S. 437), and concerns the exercise of a right rarely exercised (to require candidates for union office to file a "non-communist" affidavit). In addition the petitioner asks this Court to decide in the first instance, two further questions, which the courts below did not reach since they concluded that federal jurisdiction had not been established, which, for the reason just noted, are not of practical importance, as to which there is no conflict in the circuits, and which are, in any event, plainly insubstantial.

I

A. *The Court Below Read Calhoon* v. *Harvey, 379 U.S. 134, Correctly, And There Is No Conflict Between The Circuits.*

Title I of the LMRDA contains a "bill of rights of members of labor organizations" enforceable through private suits by those members. Title IV of the LMRDA, regulates union elections in detail and is enforceable through suits by the Secretary of Labor. In this case, both the District Court and the Court of Appeals, held (Pet. App. 3a-10a, 22a-25a), on the authority of *Calhoon* v. *Harvey*, 379 U.S. 134, that Title I does not confer jurisdiction where a union member attempts to reformulate what "in substance" is a Title IV challenge to the validity of an eligibility rule (here that members must complete a "non-communist" affidavit in order to run for office), into a complaint pursuant to § 101(a)(2), the "free speech" provision of Title I.

The petitioner claims:

"The first question presented in this petition is im-

> portant because clarification is needed of the scope of *Calhoun* v. *Harvey*, 379 U.S. 134 (1964), and because the issues and conflicts which this Court sought to resolve by its decision in *Calhoun* remain extant." Pet. 8.

The main buttress for this claim is the assertion that "there is a conflict between the court below and other circuits over the meaning of *Calhoon* v. *Harvey*." Pet. 13. There is no such conflict.

The two courts of appeals (the Second and Seventh Circuits) that have passed on the applicability of *Calhoon* to cases such as this, are in agreement that the contours of the principle there announced are precise and definite, and that the "issues and conflicts which this Court sought to resolve by its decisions in *Calhoon*," were there resolved and are no longer "extant."

As the petitioner acknowledges: "Although the rights protected by Title I and Title IV overlap to some extent, the remedies available under each Title differ markedly." Pet. App. 8. The harmonizing rule of *Calhoon* which fuses these disparate parts into a whole is that:

> "[W]e are satisfied that the Act itself shows clearly by its structure and language that the disputes here, basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title." 379 U.S. at 141.

Obviously, "*Calhoon* did not prohibit Title I suits in the election area." *Clothing Workers Rank & File Committee*

v. *Amalgamated Clothing Workers*, 473 F.2d 1303, 1306 (C.A.3).[2] But, as the Second Circuit held in the case most heavily relied upon by the petitioner (Pet. 14), *Schonfeld* v. *Penza*, 477 F.2d 899, 904 (C.A.2):

> "The competing values between Title I rights and Title IV procedural requirements are best reconciled, in our opinion, by limiting initial federal court intervention to cases where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union. *Cf.* Navarro v. Gannon, *supra*, 385 F.2d at 520. We think that the allegations in the complaints here were sufficient to meet this test."

In the instant case the Seventh Circuit, quoted from, relied upon, and followed the *Schonfeld* approach. Pet. App. 6a-7a. It held, first, that here, as in *Calhoon*,

> "Since Driscoll's allegations 'basically relate' to eligibility and charge 'in substance' that he has been denied the right to run for office in his union, he is therefore stating a cause of action which can be enforced only under the provisions of Title IV calling for complaint to and suit by the Secretary of Labor as the exclusive remedy." Pet. App. 5a.

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[2] In *Clothing Workers*, the court did not go beyond this generalization because, as in *Calhoon*, 379 U.S. at 139, the Title I claims raised, on their own terms and without regard to Title IV, did not provide a basis upon which "to grant the relief requested." See 473 F.2d at 1307-1308.

And, second, that:

> "We find that the complaint of Driscoll in the instant case, although alleging the denial of Title I rights, is insufficient to invoke jurisdiction under the rationale of *Schonfeld*. The complaint does not allege that the candidacy requirement is part of a purposeful program of suppressing any expression of dissent by plaintiff. Nor does it appear that the eligibility requirement is a discriminatory, *ad hoc* device calculated to perpetuating certain individuals in office." Pet. App. 7a.

Thus, the "conflict" is one of *result* due to failure of the petitioner to meet the burden of proof imposed on him by *Schonfeld,* whereas the plaintiff in *Schonfeld* succeeded because he did meet that burden. It is not a conflict among the circuits as to the meaning of the statute within the scope of this Court's precedents.

B. *The Petitioner's Underlying Title I Claim Is Insubstantial.*

The court below having concluded that Title I did not confer jurisdiction did not treat with the petitioner's § 101(a)(2) claim on the merits. Pet. 19. He raises and argues that claim, nonetheless, on the ground that "were this Court to hear the jurisdictional issues, we believe it would promote judical efficiency for it to hear simultaneously the merits of the case." Pet. 19. The petitioner's position is that Congress in enacting § 101(a)(2) intended to prohibit "non-communist" affidavits such as that employed by the Unions. Pet. 19-20. We respond to his argument at this point to demonstrate its patent insubstantiality, since, if the underlying claim is without merit, there is no

point in further review of the jurisdictional issue posed.

> "If the words [of § 101(a)(2)] are read in complete isolation from their context in the Act, [the] interpretation [urged by the petitioner] is possible. However, 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisons of the whole law, and to its object and policy.' " *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285. See also, e.g., *Musicians* v. *Wittstein,* 379 U.S. 171, 176; *Hodgson* v. *Steelworkers,* 403 U.S. 333, 336-338.

Looking to the "provisions of the whole law" we find that in § 504 of the LMRDA, Congress provided:

> "No person who is or has been a member of the Communist Party * * * shall serve * * * as an officer * * * of any labor organization * * * during or for five years after the termination of his membership in the Communist Party".

Moreover, § 504 was the successor to § 9(h) of the Labor Management Relations Act of 1947. Congress's deletion of the § 9(h) "non-communist affidavit" requirement, in favor of § 504, was not the product of the belief that such affidavits impermissibly invade individual rights. Section 9(h) was deleted because it "den[ied] a union access to the National Labor Relations Board [when] its officers did not file a proper report;" which sanction Congress concluded was "unwise * * * ineffective * * * unfair * * * [and] cumbersome." S. Rep. No. 197 on S. 155, 86th Cong. 1st Sess., at p. 9; 1 NLRB Legislative History of the LMRDA at p. 405. And § 504 was "adopted * * * as a more effective restriction against Communist infiltration of labor

organizations than is contained in subsection (h) of section 9 of the National Labor Relations Act, as amended." H. Rep. No. 741 on H. R. 8342, 86th Cong. 1st Sess. at p. 33; 1 Leg. Hist. at p. 791.

Against this background, to read § 101(a)(2) as embodying a Congressional intent to prohibit union rules providing for an affidavit affirming that a candidate is not presently a member of the Communist Party "knowing of and sharing in * * * [its] advocacy [of] * * * the overthrow of the United States Government by force or violence," is not to "reconstitute the gamut of values current at the time when the [statutory] words were uttered," (*Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 620, quoting L. Hand, J.), it is to abandon them.

II

A. *The Holding That The Unions' Action Complained Of Here Was Not "State Action" Is In Accord With The Principles Of Moose Lodge v. Irvis, 407 U.S. 163.*

In the lower courts, the petitioner, in support of his constitutional claim argued: first, that unions should be considered an arm of the state all of whose activities are subject to the "imposition of constitutional restraints," (Pet. App. 11a); and secondarily, that § 401(e) of the LMRDA and the fact that the Secretary of Labor refused to institute suit on his behalf demonstrated state involvement in the imposition of the "non-communist" affidavit (Pet. App. 12a). The Seventh Circuit, in proper reliance on *Moose Lodge* v. *Irvis*, 407 U.S. 163, 173, 175-176 & n. 3, rejected both these arguments. Pet. App. 10a-13a.

Continuing his search for "significant [state] involvement" in the alleged wrong (*Moose Lodge*, 407 U.S. at 173; compare, *Powe* v. *Miles*, 407 F.2d 73, 81 (C.A.2)), the petitioner now claims (Pet. 16-18), that the lower court's decision is inconsistent with *Moose Lodge* on the theory that there are provisions of federal law other than those he cited below that "place state sanctions behind" (407 U.S. at 178), the Unions' non-communist affidavit requirement: *viz*, § 504 of the LMRDA and § 9(h) of the LMRA.

But § 504 was declared unconstitutional by this Court nine years ago in *United States* v. *Brown*, 381 U.S. 437; and § 9(h) was repealed in 1959. Thus, neither can possibly be considered to be a source of "state sanction" for the Unions' rule. The petitioner's contention necessarily embraces the extravagant proposition that one who takes an action in conformity with law at the time in question, and continues that course as a matter of choice after the law ceases to be operative, is, and remains, for that purpose, an arm of state.[3]

B. *The Unions' Non-Communist Affidavit Is Constitutional.*

As was true with regard to the substantive § 101(a)(2) issue, the petitioner argues (Pet. 20-24) that his constitutional allegations provide a basis for hearing this case, despite the fact that both of the courts below (Pet. App. 13a-14a, 20a-22a) concluded that there was no "state

[3] *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (C.A.4) cert. denied 376 U.S. 939, has nothing to do with the issues in this case. The force of the statute (the Hill-Burton Act) relied upon there to show "state action" had not long previously spent itself. It was operative at the time of the litigation and would have continued operative but for the decision in *Simkins*.

action," and therefore declined to rule on the merits of his claim. Once again, however, this argument serves to demonstrate the petition's lack of merit.

The Chief Justice has emphasized that:

> "[T]he Court [has] sustained inquiry into • • • associational activities [where] it was narrowly confined to organizations that the individual had known to have the purpose of violent overthrow of the government and whose purpose the individual shared." *Cole* v. *Richardson*, 405 U.S. 676, 680.

The Unions' "non-communist" affidavit meets these requirements.[4] It reaches only present membership in the "Communist Party or other organizations that advocate the overthrow of the United States Government by force or violence." The explicit reference to the Communist Party is proper in light of the decision in *Scales* v. *United States*, 367 U.S. 203. And the fact that only present membership is involved insures that "individuals [will not have] to reach back into their pasts to recall minor, sometimes innocent, activities." *Cole*, 405 U.S. at 681. Moreover, membership *per se* is not enough, only membership "knowing of and sharing in such advocacy" and for the purpose of "acting pursuant to the teaching that the • • • Government should be overthrown by such means" is proscribed.

And, as the foregoing demonstrates, the petitioner's

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[4] "I swear that I am not a member of the Communist Party or other organization that advocates the overthrow of the United States Government by force or violence, knowing of and sharing in such advocacy and acting pursuant to the teaching that the United States Government should be overthrown py such means." Pet. App. 2a, n. 1.

argument that the affidavit is unduly vague and uncertain (Pet. 22-23), is most appropriately answered by the language of Mr. Justice Harlan quoted in *Cole*: "[A]lmost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel • • • [But here such an approach] amounts to little more than verbal calisthenics." 405 U.S. at 683-684. The petitioner's final point, that procedural due process requires a hearing before disqualification for failure to sign the affidavit (Pet. 23) is also rebutted by *Cole* where the Court stated: "All of the cases in this Court that require a hearing before discharge for failure to take an oath involved impermissible oaths." 405 U.S. at 686.

Thus, the instant case is wholly distinct from *Communist Party of Indiana* v. *Whitcomb*, —— U.S. ——, 42 L.W. 4129 (Jan. 9, 1974), where the Court overturned "a broad oath embracing advocacy of abstract doctrine as well as advocacy of action." *Id.* at 4131.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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